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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**THE LIONS CLUB OF ALBANY,
CALIFORNIA, A Nonprofit Corporation,**

Plaintiff,

v.

**THE CITY OF ALBANY, a Charter City; and
DOES 1 through 25;**

Defendants.

Case No. 4:22-cv-05377

**DECLARATION OF KENNETH BERNER
IN SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

I, Kenneth Berner declare:

1. I am the Immediate Past President of the Lions Club of Albany, California.
2. I have been a member of the Lions Club for more than 53 years.
3. I know of my own personal knowledge that the Lions Club constructed the steel and plexiglas lighted cross on property owned by Hubert and Ruth Call in 1971.
4. I have read and seen a Grant Deed executed by Hubert Call and his wife Ruth Call dated August 17, 1973, with a County Recorder stamp dated August 24, 1973, conveying to the Albany Lions Club an easement for ingress and egress to maintain the existing cross standing on the Call's property on Albany Hill.

5. Every year since its construction the Lions Club has illuminated the Cross on Albany Hill prior to each Christmas and Easter.

6. When illuminated the Cross is visible at night in many parts of Albany and Berkeley.

7. Every year since its construction, the Lions Club continued a long-standing community tradition of celebrating Easter Morning services at the Cross on Albany Hill.

8. Since 1971 the Lions Club has expended considerable time and money repairing and maintaining the Cross.

9. I have personally visited the park at the top of Albany Hill on many occasions and found the Cross to stand on the eastern side of the park near the edge of a steep slope. The Cross stands approximately 28 feet high and eight feet in width. The Cross stands on a concrete base measuring six feet by four feet. In total the Cross occupies approximately 48 square feet of space. The Cross stands away from the trail and does not impede pedestrian walking traffic through the park or interfere with wildlife.

10. Pictured below are two photographs of the Cross. The first shows the Cross at the edge of the park looking in an easterly direction toward the Berkeley hills. The second photo is a view of the Cross showing a central trail looking in a southerly direction. The photographs are fair and accurate representations of the Cross as it appears in the park.



11. On March 23, 2022, I signed a letter addressed to the Mayor and Albany City Council in opposition to the City's proposed Resolution of Necessity. A copy of the letter is

1 attached as Exhibit 1 and attached to the Declaration of Robert E. Nichols in Support of Motion
2 for Temporary Preliminary Injunction.

3 12. On April 4, 2022, I attended the City Council meeting via video conferencing at
4 which the Council was considering a Resolution of Necessity condemning the Lions easement on
5 Albany Hill and seeking removal of the Cross. At the meeting representatives of the Lions Club
6 repeated the offer contained in the March 23, 2022 letter to purchase the plot of land upon which
7 the Cross is located indicating that allowing the Cross to be sold to the Lions would resolve the
8 City's potential Establishment Clause concern because the Cross would then rest upon private,
9 nongovernmental property. I heard the City's attorney acknowledge this offer constituted an
10 alternative to the exercise of eminent domain that the City could consider. Following further
11 comments from the Lions representatives and citizens comments opposing the Cross, the City
12 Council adopted the Resolution of Necessity without any questions, comments or discussion by the
13 Councilmembers.

14 13. I have reviewed the legal documents served on the Lions Club by the City and
15 understand that the City has sought and obtained an Order of Prejudgment Possession thereby
16 immediately taking possession of the Lions easement and allowing the City to remove the Cross
17 from Albany Hill after October 4, 2022.

18 14. The taking of the Lions' easement and removal of the Cross by the City will prevent
19 the Lions Club from exercising its rights to free exercise of religion and free speech by preventing
20 the illumination of the Christian Cross during the Christmas and Easter seasons.

21 15. The taking of the Lions' easement and removal of the Cross by the City will prevent
22 the Lions Club from exercising its rights to free exercise of religion and free speech by ending a
23 long-standing tradition of hosting Easter Morning religious services at the Cross.

24 16. I have observed, particularly in this post COVID environment, even temporary
25 termination or postponement of traditions and practices will result in a reduction of participation
26 when those traditions and practices are reinstated. The taking of the Lions' easement and removal
27 of the Cross, by the City even temporarily will hinder and burden the Lions Club's exercise of its
28

1 rights to free exercise of religion and free speech because some community members will stop
2 regularly visiting the Cross, and stop attending Easter Morning services.

3 17. It is also well known that changes in the location of businesses and events harm
4 attendance and result in reductions of the number of persons visiting and attending future events.
5 If the Lions Club is forced to relocate the Cross, the change in location and lapse of time will
6 undoubtedly result in a reduction in community association and attendance thereby burdening the
7 Lions Club's free expression of religion and free speech.

8 18. The Lions Club regularly receives comments and notes from the churches and
9 community members in appreciation of the Cross generally and when illuminated during the
10 religious holiday seasons. The taking of the Lions' easement and removal of the Cross by the City
11 will prevent the Lions Club's exercising its rights to free exercise of religion and free speech by
12 associating with church and community members and symbolically sharing Christian ideas through
13 the year-round display of the Cross.

14 I declare under the penalty of perjury under the laws of the state of California and the United
15 States that the foregoing is true and correct, and that this Declaration is executed this 22nd day of
16 September, 2022.



KENNETH BERNER
Immediate Past President
Lions Club of Albany, California